U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF Y-F-

DATE: AUG. 10, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a manufacturer and wholesaler of food products, seeks to employ the Beneficiary as a training specialist. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that the offered position requires a professional with an advanced degree.

On appeal, the Petitioner submits additional evidence and states that the offered position requires a professional with an advanced degree.

Upon *de novo* review, we will withdraw the Director's decision and remand the matter for further proceedings consistent with our opinion and for the entry of a new decision.

I. LAW

A. The Employment-Based Immigration Process

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL).[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is November 26, 2013. *See* 8 C.F.R. § 204.5(d).

approves the petition, the foreign national applies for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

B. Advanced Degree Professional

The regulation at 8 C.F.R. § 204.5(k)(2) defines the term "advanced degree" as:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

> (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
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> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, the job offer portion of the labor certification must require a professional holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(4)(i).

II. REQUIREMENTS OF THE OFFERED POSITION

The Director concluded that the Petitioner did not establish that the offered position of training specialist requires a professional with an advanced degree. The key to determining the job qualifications is found on ETA Form 9089, Application for Permanent Employment Certification, at Part H. This section describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Section H of the labor certification states that the offered position has the following minimum requirements:

> H.4. Education: Master's degree in human resources or social science (literature).
> H.5. Training: None required.
> H.6. Experience in the job offered: 12 months.
> H.7. Alternate field of study: None accepted.

H.8. Alternate combination of education and experience: "Bachelor's degree, or any suitable combination of education, training o"[2] and five years of experience.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: None accepted.

Part H.14. states that the position requires a "Master's Degree in Human Resources or Social Science (Literature) and 1 year of experience. In lieu of, will accept a Bachelor's degree and 5 years of experience, or any suitable combination of education, training or experience thereof." It further states that "[n]o less than a Bachelor's degree and 5 years of experience is acceptable."

In this case, the Director determined that the language used on the labor certification indicated that the Petitioner was willing to accept something other than a bachelor's degree as an alternative education requirement for the offered job of training specialist. Thus, he determined that the offered position does not require a professional holding an advanced degree because an applicant may qualify for the job with less than a bachelor's degree followed by at least five years of progressive experience. However, this interpretation disregards Part H.14, which summarizes the education and experience required for the offered position.

On appeal, the Petitioner asserts that no less than a bachelor's degree and five years of experience is acceptable. It states that it never intended to permit an applicant to qualify for the position with less than a bachelor's degree and five years of experience, as evidenced by its labor certification entry at Part H.14 and its recruitment for the offered position.

The record contains the recruitment that the Petitioner conducted for the offered job, including the prevailing wage determination, the California job order, the notice of posting of the job opportunity, its internal advertisements and postings, and its newspaper advertisements. Where the Petitioner's recruitment specifies the minimum requirements for the offered job, it specifically indicates that (1) the minimum requirements are a master's degree in human resources or social science (literature) and one year of experience; or a bachelor's degree and five years of experience, or any suitable combination of education, training, or experience; and (2) no less than a bachelor's degree and five years of experience is acceptable.

Based on our review of entirety of the labor certification, we find that the offered position requires a professional holding an advanced degree. The Petitioner's recruitment for the offered job supports this finding. Therefore, we will withdraw the Director's finding on this issue. However, for the reason set forth below, we do not find the petition approvable.

[2] The remainder of the wording on the labor certification was cut off, but was detailed in Part H.14.

III. ABILITY TO PAY THE PROFFERED WAGE

Although not addressed by the Director, the Petitioner has not established its continuing ability to pay the proffered wage from the November 26, 2013, priority date onward. The proffered wage in this case is $51,314.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The Petitioner listed on the Form I-140, Immigrant Petition for Alien Worker, is [redacted] The Petitioner stated on the Form I-140 and labor certification that its federal employer identification number (EIN) is [redacted]. The EIN listed on the Form I-140 and labor certification for [redacted] is different that the EIN listed on the 2013 through 2016 federal tax returns for [redacted] submitted to the record. The EIN listed on the tax returns for [redacted] is [redacted] Thus, the tax returns in the record do not establish the Petitioner's ability to pay the proffered wage because they contain a different EIN than the one listed on the petition and labor certification.[5] We notified the Petitioner of this discrepancy in a request for evidence (RFE) and asked it to submit regulatory prescribed evidence of its ability to pay the proffered wage from the priority date in 2013 onward.[6] We stated that its response should include a copy of the letter from the Internal Revenue Service (IRS) assigning its EIN.

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[3] No entity designation, such as L.P., is listed.

[4] The tax returns submitted to the record are not certified by the IRS indicating that they have been filed and processed using the EIN listed.

[5] The record also contains consolidated audited financial statements for [redacted] and subsidiary for 2013 and 2017. The financial statements do not clarify the Petitioner's EIN. Further, the financial statements include a subsidiary. If the Petitioner is a limited partnership, then it is a separate and distinct legal entity from its subsidiaries. The assets of its subsidiaries cannot generally be considered in determining the Petitioner's ability to pay the proffered wage. *See Matter of Aphrodite Invs., Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, No. Civ. A. 02-30197-MAP, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." The record also contains copies of Forms W-2, Wage and Tax Statement, and paychecks demonstrating that [redacted] with EIN [redacted] paid the Beneficiary wages in 2015, 2016, 2017, and 2018. However, because the Petitioner has not established that it is the employer who issued the Forms W-2 and paychecks, the Forms W-2 and paychecks do not demonstrate wages paid by the Petitioner to the Beneficiary.

[6] We notified the Petitioner that it must resolve this inconsistency in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In response to the RFE, the Petitioner indicated that the EIN on the Form I-140 is not correct and provided an "Addendum to I-140" stating "Please delete IRS Tax ID Number in Part 1, Item 3, and insert: [redacted] It did not address the EIN listed on the labor certification, and it did not provide a copy of the letter from the IRS assigning its EIN. Thus, the record does not contain independent, objective evidence of the Petitioner's correct EIN. *See Matter of Ho*, 19 I&N Dec. at 591-92. Further, USCIS records show that several other Forms I-140 and Forms I-129, Petition for Nonimmigrant Worker, have been filed by [redacted] using EIN [redacted], contradicting the Petitioner's claim that the EIN listed on this petition is incorrect. Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the petition. *Id.* The Petitioner has not established its ability to pay the proffered wage because it has not established that the financial documents in the record, including tax returns, audited financial statements, wage statements, and paychecks, belong to the employer listed on the Form I-140 and labor certification.

Further, as noted above, multiple Form I-140 petitions have been filed by [redacted] using EIN [redacted] Two additional Form I-140 petitions have also been filed by [redacted] using EIN 95-4563002. Where a petitioner has filed Form I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. *See* 8 C.F.R. § 204.5(g)(2); *see also Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the Petitioner's other Form I-140 petitions that were pending or filed after the priority date of the current petition.[7] We do not consider the other beneficiaries for any year that the Petitioner has paid the Beneficiary a salary equal to or greater than the proffered wage.

The Petitioner must document the receipt numbers, names of beneficiaries, priority dates, and proffered wages of these other petitions, and indicate the status of each petition and the date of any status change (i.e., pending, approved, withdrawn, revoked, denied, on appeal or motion, beneficiary obtained lawful permanent residence). To offset the total wage burden, the Petitioner may submit documentation showing that it paid wages to other beneficiaries. To demonstrate that it has the ability to pay the Beneficiary and the other beneficiaries, the Petitioner must, for each year at issue (a) calculate any shortfall between the proffered wages and any actual wages paid to the primary Beneficiary and its other beneficiaries, (b) add these amounts together to calculate the total wage deficiency, and (c) demonstrate that its net income or net current assets exceed the total wage deficiency.[8]

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[7] The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

[8] It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012).

On remand, the Director should consider whether the Petitioner has the ability to pay the combined proffered wages of all of its applicable beneficiaries.

IV. CONCLUSION

The decision of the Director will be withdrawn. The matter is remanded to the Director for consideration of whether the Petitioner has the ability to pay the combined proffered wages of all of its applicable beneficiaries. The Director may request any additional evidence considered pertinent. Similarly, the Petitioner may provide additional evidence within a reasonable period of time to be determined by the Director. Upon receipt of all the evidence, the Director will review the entire record and enter a new decision.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of Y-F-*, ID# 1232690 (AAO Aug. 10, 2018)